

EXHIBIT "A"  
STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 4996-s43D BY  
ERNEST G. DEVRIES

FILMED  
APR 9 1990

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on April 9, 1976, by the Hearing Examiner, and the Memorandum of Law in Support of the Proposal for Decision as entered on April 13, 1976, by the Hearing Examiner, are hereby modified and adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 2.22 cubic feet per second or 1,000 gallons per minute of water and not to exceed 378 acre-feet per annum from Clear (Alkali) Creek, a tributary of Rock Creek, in Carbon County, Montana. The water is to be impounded in an enlarged existing reservoir with a new capacity of 10 acre-feet, located in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 8, Township 6 South, Range 21 East. The point of diversion from Clear (Alkali) Creek is at a point in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 8, Township 6 South, Range 21 East. The water will be pumped from the reservoir to irrigate by a sprinkler system 140 acres, more or less, in Section 9, Township 6 South, Range 21 East, from April 15 to October 15, inclusive, of each year.

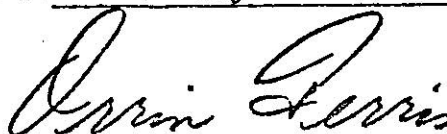
2. The Applicant may transfer his decreed rights from lands now being irrigated to the 140-acre tract. The Applicant shall request the

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Department to determine how many acres should be taken out of irrigation under the decree in order to irrigate the 140-acre tract. Under no circumstances will decreed water be used to irrigate the 140-acre tract until this is accomplished, and once this acreage is determined, the lands so withdrawn from irrigation by decreed water shall not be irrigated by decreed waters. These lands upon request can be irrigated under the right granted in Section 1 of this permit, if so requested.

3. The permit is granted subject to all prior water rights in the source of supply, and any final determination of prior existing water rights in the source of supply provided for by Montana law.

Done this 24<sup>th</sup> day of May, 1976.

  
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Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation  
Natural Resources Building  
32 South Ewing  
Helena, MT 59601

**CASE # 4996**

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
NO. 4996-s43D BY ERNEST G. )  
DEVRIES )

MEMORANDUM OF LAW IN SUPPORT OF  
PROPOSAL FOR DECISION

This was an extremely difficult decision to reach because we are dealing with return flows. As the testimony at the hearing points out, return flows are not subject to easy quantification. In this case, we are dealing with the same rate of diversion to flood irrigate a 70-acre tract as would be necessary to sprinkle irrigate a 140-tract. From the testimony of Mr. Guenther, he indicated that such change would reduce the return flow from the irrigation system of the Applicant.

Under the Water Use Act of 1973 (Chapter 8, Title 89, R.C.M. 1947), the Department of Natural Resources and Conservation is required to approve the change if it determines that the change "will not adversely affect the rights of other persons." Since 1885 this authorization existed subject to the same limitation that "other rights must not be injured."

The problem arising with sprinkler systems is that it is a more efficient use of water. This is easily seen by the fact that the Applicant is able to sprinkle irrigate 140 acres as opposed to flood irrigating 70 acres by diverting the quantity of water.

A significant amount of the water initially diverted usually finds its way back to the stream, so that this "waste" or return flow from an old flood system may constitute a significant portion of the downstream flow relied upon and

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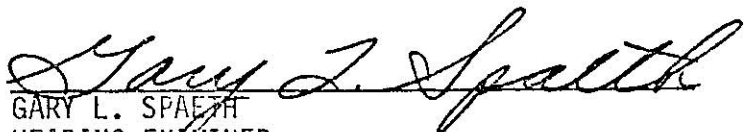
appropriated by other users. Thus, replacing a highly inefficient (i.e., high return flow flood irrigation) system with an efficient (i.e., low return flow sprinkler irrigation) system could significantly reduce the amount of water downstream. This is especially true in many instances when bench lands farther from the stream are sprinkled and the water simply never returns to the stream in significant amounts. Those who have relied upon the presence of the return flow to satisfy their appropriation right will obviously be adversely affected if the quantity of that return flow is reduced. The important question is the difference between the amount of water downstream before and after the sprinkler system is installed.

From Montana case law (Creek v. Bozeman W.W. Co., 15 Mont. 212 and Gassert v. Noyes, 18 Mont. 216) it is clear that an appropriation right is measured in its relationship to other appropriation rights, not only by how much water is initially diverted from the stream but also by the mode of water application and its resulting effect upon the amount of water returning to the stream. In other words, return flow is an important criteria in determining whether someone will be adversely affected by a change.

Finally, it is important to encourage more efficient use of water such as sprinkler irrigation. By so allowing such changes, you can generally increase the number of acres being irrigated in a drainage.

In conclusion, I have tried to balance the need for more efficient irrigation systems and the protection of either prior appropriators.

DATED this 13<sup>th</sup> day of April, 1976.

  
GARY L. SPAETH  
HEARING EXAMINER

**CASE # 4996**

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

-----  
IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE )  
PERMIT NO. 4996-s43D BY )  
ERNEST G. DEVRIES )  
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PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice, a hearing on objections to the above-named Application was held on December 4, 1975, at Joliet, Montana. The Applicant, Mr. Ernest G. DeVries, and his son, Mr. Chuck DeVries, formerly of Roberts and now residing in Great Falls, Montana, appeared at the hearing and presented testimony on behalf of the application.

The following filed with the Department timely objections to the above application: Mr. Lyle M. Kamppinen, Executor of the Estate of Lempi M. Kamppinen; Mr. David Stark; Ms. Martha DeVries; Mr. Emil Kober; Messrs. Walter and Roy Million; Mr. Ray M. and Mrs. Anne Burows; Ms. Lillie Brinkema; Mr. Carl DeVries; Mr. Walter Schwend; Mr. Richard Jones; Ms. Beverly DeVries; Mr. Oliver Wilson, the Rocky Fork Decreed Users Inc., of Carbon County; and Mr. Pierce Jones.

The following objectors were present at the hearing and most either stated their position or agreed with one of the other objectors in his statement: Mr. David Stark; Mr. Frank DeVries representing his mother, Mrs. Martha DeVries; Mr. Emil Kober; Mr. Walter Million for himself and Mr. Roy Million; Mr. Roy A. and Mrs. Anne Burows; Ms. Lillie Brinkema; Mr. Carl DeVries; Mr. Pierce Jones; Mr. Walter Schwend; Mr. Richard Jones; Ms. Beverly DeVries and the Rocky Fork Decreed Users, Inc., represented by Directors, Mr. Oliver Wilson, Mr. Toivo Lantta, Mr. Everett Zumbrun and Mr. Pat Billingsly.

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The Department introduced into evidence a copy of the decreed water rights in Clear Creek which designated the amount and date of the decreed rights of the Applicant, as well as other users. There were no objections to the exhibit and it was received into evidence.

It was discovered after the December 4, 1975, hearing that due to a malfunction with the tape recorder a record was not made. Thus a new hearing on the matter was held February 9, 1976 at Roberts, Montana. The Applicant appeared and presented testimony on behalf of his application. The following Objectors were present at the hearing and presented testimony on behalf of their objection; Mr. David Stark, Mr. Emil Kober, Mr. Pierce Jones, Mr. Richard Jones, and Mr. Toivo Lantta on behalf of the Rocky Fork Decreed Users, Inc.

The Department introduced into evidence a field report conducted on February 3, 1976, by Mr. Don Riddle of the Department's Billings office.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact and Conclusions of Law and Order:

PROPOSED FINDINGS OF FACT

1. On March 10, 1975, at 11:45 a.m., the Applicant submitted to the Department an Application for Beneficial Water User Permit seeking to appropriate 2.22 cubic feet per second or 1,000 gallons per minute of water, not to exceed 378 acre-feet per annum, from Clear (Alkali) Creek, a tributary of Rock Creek in Carbon County, Montana. The water is to be impounded in an enlarged existing reservoir with a new capacity of 10 acre-feet, located in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 8, Township 6 South, Range 21 East. The point of diversion from Clear Creek (Alkali) is at a point in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 8, Township 6 South, Range 21 East, with a gravity flow ditch conveying the water from the point of diversion to the reservoir. The water will be pumped from the reservoir to irrigate by a sprinkler system 140 acres, more or less, in Section 9, Township 6 South, Range 21 East, from April 15 to October 15, inclusive, of each year.

2. From testimony received from the Applicant and Department's Exhibit No. 1, the Applicant has the following decreed rights: 40 miner's inches - June 1, 1893; 110 miner's inches - July 10, 1898; 40 miner's inches - June 1, 1893; 125 miner's inches - July 10, 1898; 150 miner's inches - August 3, 1905; and 50 inches - June 1, 1897.

3. The 140 acres of land which is proposed to be irrigated has never been irrigated before the time the application was made.

4. The Applicant, in testimony presented at the hearing, indicated that he intended only to use his present decreed water rights to irrigate the 140 acres. That he had not intended to apply for any new water appropriation.

5. The Applicant testified that he had withdrawn from irrigation approximately 70 acres of bottom land. That he was going to use this water as well as other decreed waters to supply the sprinkler system with 90 miner's inches for the 140 acres.

6. The Applicant submitted for consideration his March 6, 1975 letter to Larry Johns of the Department. It stated that the Applicant flood irrigated approximately 200 acres on the west bench of Clear Creek with 200 miner's inches and approximately 60 acres with 60 miner's inches on the east side of Clear Creek. That the Applicant sprinkle irrigates approximately 260 acres on the east bench of Clear Creek with two systems. One system, covering 110 acres, was installed in 1968 and one system covering 150 acres was installed in 1972. These systems utilize 165 miner's inches.

7. The Objectors expressed concern about the application for new water out of Clear Creek and were generally opposed to any new appropriation of water out of Clear Creek.

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8. Mr. Scott Guenther, engineer with the Department's Billings office, conducted a field investigation of the Applicant's proposed diversion site on February 2, 1976. Mr. Guenther testified that he had consulted with the U.S. Soil Conservation Service as to the soil type on the seventy-acre tract near Clear Creek and the 140-acre tract that the Applicant proposed to irrigate. Mr. Guenther concluded that on the 70-acre tract that it would take approximately 7½ inches of water to saturate the ground to the three-foot level if flood irrigated. Further that about half that amount would return to the stream.

Mr. Guenther went on to testify that while it would take about the same flow as the seventy-acre tract to sprinkle the 140-acre tract that the Applicant proposes to irrigate, it would only take four inches of water with about 1 inch returning to the stream.

9. Based on Mr. Guenther's testimony, the Applicant by not irrigating the 70-acre tract and sprinkler irrigating the 140-acre tract with the same flow of water would reduce the net return flow to the stream by about three inches.

Based on the above Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from Clear Creek.
2. There are at times unappropriated waters in the source of supply, principally during the spring runoff.
3. Valid prior water rights of prior appropriators of water from Clear Creek must, by statute, be protected.
4. The rights of prior appropriators will be protected if the permit is conditioned to protect those rights.
5. Clear Creek is a duly decreed stream.
6. The Objectors presenting evidence at the hearing appear to have valid



decreed rights along Clear Creek, although several of the Objectors who appeared were seeking to protect decreed water rights on Rock Creek to which Clear Creek is a tributary.

7. A water commissioner is seldom appointed to administer the decrees along Clear Creek.

8. By conditioning the permit to either allow the irrigation by use of Clear Creek flood waters or the transfer of a decreed right from lands already being irrigated, will protect the rights of prior appropriators. The exact acreage presently being irrigated by decreed water, which would need to be withdrawn from flood irrigation, cannot be determined without further field investigation. Proposal to transfer the decreed right from flood irrigation on the 70-acre tract to sprinkler irrigation would result in a higher consumptive use of the decree rights of the Applicant. This would adversely affect other water users on Clear Creek.

9. The proposed means of diversion is adequate.

10. The proposed use of the water constitutes beneficial use.

11. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

12. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

13. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those applied for, nor does anything herein have bearing upon the status of claimed rights of any other party, except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 2.22 cubic feet per second or 1,000 gallons per minute of water, not to exceed 378 acre-feet per annum, from Clear (Alkali) Creek, a tributary of Rock Creek in Carbon County, Montana. The water is to be impounded in an enlarged existing reservoir with a new capacity of 10 acre-feet, located in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 8, Township 6 South, Range 21 East. The point of diversion from Clear (Alkali) Creek is at a point in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 8, Township 6 South, Range 21 East. The water will be pumped from the reservoir to irrigate by a sprinkler system 140 acres, more or less, in Section 9, Township 6 South, Range 21 East, from April 15 to October 15, inclusive, of each year.

2. The Applicant may transfer his decreed rights from lands presently being irrigated to the 140-acre tract. The Applicant shall request the Department to determine how many acres should be taken out of irrigation under the decree in order to irrigate the 140-acre tract. Under no circumstance will decreed water be used to irrigate the 140-acre tract until this is accomplished and once this acreage is determined, the lands so withdrawn from irrigation by decreed water shall not be irrigated by decreed waters. These lands upon request can be irrigated under the right granted in Section 1 of this permit, if so requested.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon

receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 9<sup>th</sup> day of April, 1976.

*Harry J. Spalth*  
HEARING EXAMINER

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